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No. 378

In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES CLARENCE EVANS, COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE, JOHN F. KISER, HIS SUCCESSOR IN OFFICE, AND J. M. DICKINSON, PRESENT COMMISSIONER OF FINANCE AND TAXATION

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the Chancery Court, Part I, of Davidson County, Tennessee (R. 314–319) is unreported. The original opinion of the Supreme Court of Tennessee (R. 6–12) is reported at 250 S. W. 2d 569. The opinion on the petition to rehear (R. 24–25) has not been reported.

JURISDICTION

The judgment of the Supreme Court of Tennessee was entered on June 7, 1952 (R. 13). A petition to rehear, seasonably filed by appellant Esso Standard Oil Company on June 16, 1952 (R. 14), was entertained and denied with an opinion (R. 24–26) on July 11, 1952. The petition for allowance of an appeal was filed October 2, 1952 (R. 321), and was allowed on the same date (R. 322). This Court, by order of November 10, 1952 (R. 327), noted probable jurisdiction.[1] The jurisdiction of this Court to review the decision by appeal is conferred by 28 U. S. C., Sections 1257 (2) and 2101 (b).

QUESTIONS PRESENTED

1. Whether the Tennessee gasoline tax of seven cents per gallon, assessed against and collected from a Government contractor storing aviation gasoline for the United States, is valid under the Constitution of the United States to the extent assessed with respect to gasoline owned by the United States.

2. Whether the Tennessee gasoline tax statute unconstitutionally discriminates against the United States in that, as construed by the State Supreme Court, it imposes a tax with respect to

[1] The Court also noted probable jurisdiction in the companion case (*Esso Standard Oil Co.* v. *Evans*, No. 330) at the same time.

gasoline owned by the United States in circumstances where the same tax would not be levied if the gasoline were owned by others.

STATUTES INVOLVED

The applicable portions of the Tennessee statutes involved are set forth in the Appendix, *infra*, pp. 54 *et seq.*

STATEMENT

This is a suit by Esso Standard Oil Company,[2] a contractor with the Government, to recover from the Tennessee Commissioner of Finance and Taxation certain gasoline taxes assessed and collected from it by the State of Tennessee with respect to Government-owned gasoline stored by Esso for the United States. The arrangement between Esso and the United States lasted from 1943 to 1948, but the statute of limitations bars collection of the tax for 1943. The instant suit, involving only the month of January 1944, is a test case. If the ruling of the state courts is applied to the remainder of the period, the amount collected by the State will amount to upwards of $3,800,000 (as calculated by the State); including the judgment below, the amount is over $4,000,000. The United States, which has agreed to reimburse Esso for taxes incident to its contract (Compl. Ex. I, R. 345–349),

[2] The Standard Oil Company of Louisiana was merged into Esso Standard Oil Company, which was formerly the Standard Oil Company of New Jersey. We shall refer to the company merely as Esso.

intervened in the trial court (R. 45–6) in support of Esso and has since participated in the case. Both the trial court and the State Supreme Court held against Esso and the United States on the taxes involved in this appeal.

1. As found by the trial court (R. 314–319) and set forth in the record, the pertinent facts may be summarized as follows:

During the time involved in this suit (January 1944), Esso was engaged in performing contracts with the War Department, entered into pursuant to the First War Powers Act of 1941 (Act of December 18, 1941, c. 593, 55 Stat. 838, Sec. 201) and Executive Order No. 9001 (December 27, 1951), providing for the storage and handling, in its own and leased facilities at Memphis, of Government-owned aviation gasoline which was brought to Tennessee from outside the State (R. 314, 329 *et seq.*). At the direction of the Army Air Forces, Esso delivered the gasoline to an Air Force base in Tennessee, or delivered it to carriers employed or owned by the United States for transportation to bases or points within or without Tennessee (R. 144–145). For its services, depending on their scope, Esso received amounts ranging from 0.18 cent to over 6 cents per gallon (R. 314); the bulk of the payments during January 1944 were at a fraction of a cent per gallon, and over the six months period from January to June 1944 were at the 0.18 cent rate (R. 441–442).

In greater detail, the course of operations was as follows: Aviation gasoline was produced in other states by several refineries, Esso being only one of them (R. 79). Upon production, it became the property of Defense Supplies Corporation (DSC) (R. 55–8), a World War II subsidiary of Reconstruction Finance Corporation, and came for allocation purposes under the jurisdiction of the Petroleum Administration for War (PAW) (R. 53–54, 59–60, 66, 79, 114–5). The gasoline involved here was allocated by PAW to the Army Air Forces for use at air bases and airfields in the South (R. 75).

Upon presentation of the proper allocation certificates to its agents, DSC delivered (and passed title to) the gasoline to an authorized property officer of the Army Air Forces, either at a refinery in Louisiana or Oklahoma or at the pipeline in East St. Louis, Illinois (R. 118, 120–1, 124, 195). The Air Forces then arranged for transportation by barge to Memphis (R. 114–5, 139). This transportation generally was by outside carrier on a Government bill-of-lading, but not infrequently was by Government barge towed by contract tugs (R. 114, 117–127). The trial court found that "in the true sense, Standard Oil Company [Esso] was neither consignee nor consignor, but that the substance of the transaction was that the Government itself was the consignee of each of these shipments * * *" (R. 317).

Upon arrival in Memphis, the gasoline was pumped by Esso into its tanks, including tanks leased for the purpose from the Lion Oil Refining Company (R. 129, 141, 152, 401). Commingling with Esso's own gasoline occurred only in minor quantities and then only in grade 91 octane (R. 149–50). At that time, all supplies of the other grade—100 octane—were wholly owned by the Government (R. 58), and the 100-octane grade constituted the bulk of the gasoline in controversy.

After storage, Esso delivered the gas only upon written direction by supply officers of the Air Forces (R. 144). Except for the relatively small gallonage delivered to the Memphis Air Base, the gasoline was placed by Esso for delivery in tank trucks owned by the Government, or in similar trucks of carriers under contract with the Air Forces (R. 144–45, 314). A very substantial part of the gasoline was transported to air bases outside of Tennessee, in Mississippi, Arkansas, etc. (R. 172–73).

2. Among other things, the various Tennessee gasoline tax statutes impose a "special privilege tax" on all "distributors" of gasoline in the State "for engaging in and carrying on such business in this state" "in an amount equal to [seven] cents for each gallon of gasoline * * * refined, manufactured, produced, or compounded by such distributor and sold, stored or distributed by him in this state, or shipped, transported or imported by

such distributor into, and distributed, stored or sold by him within this state * * **". *Infra*, pp. 55–56.[3]

Although they had full knowledge of all the facts, and Esso presented the required reports, the Tennessee revenue officials did not seek to assess, collect or demand this tax from Esso until August 1949, three years after the completion of full performance of Esso's contracts with the United States (R. 285, 307–9, 315, Compl. Ex. 46, R. 455–6, Def. Ex. 5, R. 497–9). During the contracts' performance, both Esso and the United States were led to believe that no tax was due (R. 189). Relying upon this administrative construction, the United States and Esso continued their arrangement through 1944 and in subsequent years (R. 189–90).

As noted above, demand was first made in August 1949 (R. 315). Esso paid under protest the amount demanded for the month of January 1944 (R. 7, 314), and then brought this suit to recover, contending that the statute did not impose the tax and also that, if it did, the State gasoline tax and the assessment of the tax were illegal and void under the Federal Constitution because in conflict with the immunity of the United States from state taxation. In its bill of complaint Esso alleged that "the Tennessee gaso-

[3] The case below also involved certain inspection fees, penalties and interest (R. 8, 10–11, 315–317, 318–319) which are not here in issue.

line tax law," if construed to cover this case, is invalid and void because it "is repugnant to the Constitution of the United States" (par. XX, R. 34–5), that the assessment of the tax "is illegal and void for the reason that such assessment is upon the exclusive property or instrumentality of the United States which is immune from taxation by the State of Tennessee under the Constitution of the United States" (par. XXI, R. 35), that the assessment "imposes a tax on property which is an instrumentality of the United States and constitutes an unconditional imposition upon the United States" (par. XXII, R. 35), and that the Commissioner of Finance and Taxation "has applied these provisions of the Tennessee gasoline tax law in a manner which renders that law invalid under the Constitution of the United States" (par. XXIII, R. 35). In intervening, the United States adopted these allegations (R. 46).

The Chancery Court ruled against these contentions as far as the so-called privilege tax was concerned ($196,848.68), but did disallow inspection fees, penalties and interest (R. 314–319). The federal constitutional question was preserved on appeal to the Supreme Court of Tennessee by assignments of errors filed by Esso and adopted by the United States (see Statement as to Jurisdiction in No. 330, pp. 38–39). The State Supreme Court ruled adversely to these contentions (R. 6–12).

The contention that the statute, as applied, unconstitutionally discriminates against Esso in violation of the Equal Protection Clause of the Fourteenth Amendment, was first specifically mentioned in Esso's petition to rehear in the Supreme Court of Tennessee. This contention, as well as the contention that there is an unconstitutional discrimination against the United States, were seasonably raised for the reasons discussed *infra*, pp. 51–53.

SPECIFICATION OF ERRORS TO BE URGED

The assignment of errors filed by the United States is set out in the record, at pp. 323–324. They are as follows:—

The Supreme Court of Tennessee erred:

1. In failing to hold that the Tennessee gasoline tax law (Secs. 1126, et seq. of the Code of Tennessee (1932), as amended), as construed and applied here to require the inclusion in the measure of the gasoline tax payable by Esso Standard Oil Company of gasoline owned by the United States, violates the Constitution of the United States and is void as in effect imposing a tax on property and an instrumentality of the Federal Government.

2. In failing to hold that the Tennessee gasoline tax, as assessed here, is illegal and void under the Constitution of the United States as a tax on

property and an instrumentality of the Federal Government.

3. In holding that, as applied here, the Tennessee gasoline tax law imposes a privilege tax on the business of storing gasoline and not a tax on Federally-owned gasoline, and that the tax assessed here was a privilege tax on Esso Standard Oil Company's business of storing gasoline and not a tax on Federally-owned gasoline.

4. In failing to hold that the Tennessee gasoline tax law, as construed and applied here, invalidly discriminates against the United States and Esso Standard Oil Company, contrary to the Equal Protection Clause of the Fourteenth Amendment, the Supremacy Clause, and the implied constitutional immunity of the Federal Government and those who deal with it from discrimination by the States, in that said law imposes a tax here, with respect to Federally owned gasoline, in circumstances in which the same tax would not be imposed if the gasoline were owned by a private person other than the distributor or storer.

5. In failing to hold that the Tennessee gasoline tax, as assessed here, invalidly discriminates against the United States and Esso Standard Oil Company on the grounds stated in the preceding assignment of error.

6. In affirming the judgment of the Chancery Court insofar as it gave judgment against Esso Standard Oil Company and the United States.

The United States also adopts as its own the assignment of errors heretofore filed by Esso Standard Oil Company.[4]

SUMMARY OF ARGUMENT

Tennessee has recently imposed a tax of 7 cents a gallon with respect to Government-owned gasoline for the storing of which, in 1944, Esso ordinarily received only a fraction of a cent a gallon. The tax is sought to be supported as merely a privilege tax on Esso's business as a bailee of gasoline, but it actually and in full effect amounts to an unconstitutional imposition upon the Government-owned gasoline, or upon the Government itself as user of the gasoline. Moreover, Tennessee's taxing statute, as construed by its highest court, discriminates against the United States and Esso by taxing in circumstances where the same tax would not be levied if the gasoline were owned by another than the United States.

I

A. Though the State legislature and the State Supreme Court, in the opinion below, have characterized the tax as laid upon the "privilege" of "engaging in the business of storing gasoline" (R. 8), this Court is free, in deciding an issue of constitutional immunity, to disregard this label and to determine for itself the true nature, opera-

[4] Esso's assignment of errors is set out at R. 4-5.

tion, and effect of the tax as applied and enforced in this case. The characterization of the tax for state purposes does not rule the federal question. See, *e. g., United States* v. *Allegheny County,* 322 U. S. 174, 184; *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals,* 338 U. S. 665, 674. And a survey of Tennessee's gasoline tax laws shows that in this instance the tax was not actually levied on Esso for the privilege of storing the Government's gasoline, but rather on the federal property itself or on the Government as the user of the gasoline—with advance collection of the tax from Esso.

The Tennessee statutes were developed between 1923 and 1944 to set up a system designed to tax all gasoline used in vehicles in the State at the rate of 7 cents a gallon, with certain exceptions, and to tax each gallon only once, collecting the tax as soon as possible after manufacture or importation into the State. If the gasoline is manufactured and sold in Tennessee, the manufacturer pays the tax, and no other tax is paid. If it is imported and stored, the first storer pays the tax, and neither a succeeding storer or distributor nor the consumer need pay it. If the tax is not paid by the manufacturer or one or another storer or distributor, it must be paid by the ultimate consumer. The statutes contemplate that a storer or distributor or dealer or consumer need pay the tax only with respect to gasoline not previously identified as a measure of tax

liability. Indeed, in 1947, the legislature explicitly declared, without changing the provisions of the gasoline tax statutes or the method of collection, that the tax was a levy on the consumer. This specific declaration merely put formally into the statute what had long been the reality, *i. e.*, that the tax is a levy on the ultimate user or on the gasoline.

Conversely, the tax is not really laid on the privilege of storage or distribution—as is shown by the exclusion of all gasoline previously subject to the tax so that only the first storer need pay the tax, by the provisions taking account of spillage and evaporation during storage, and by the complete disregard of length of storage, as well as by the statutory exemptions from the tax. Refunds are made to consumers for all gasoline used for industrial (i. e., non-vehicular) or agricultural purposes; gasoline destined for export has been completely excluded for some time; and aviation gasoline was recently exempted. If the tax were actually imposed on the privilege of storing, these exceptions would clearly serve no relevant purpose and would not have been made.

Furthermore, the tax of seven cents per gallon is much too large to be considered an impost on the business of storing, especially since it takes no account of the storer's costs or revenues or the duration of the storage. Normally, a jobber's spread between his cost and his selling price is far less than seven cents per gallon, and the tax

would more than eat up his entire margin. In this particular case, the difficulty of viewing the tax as one on storage is highlighted by the fact that the seven-cent levy is said to tax a storage business for which Esso mostly received a fraction of a cent per gallon.

In short, the Tennessee gasoline tax applied here is not a tax on the privilege of storage, but either a tax on the gasoline itself or on its owner-consumer. In previous cases, the State Supreme Court has sometimes indicated as much. *Tennessee Oil Co.* v. *McCanless*, 178 Tenn. 683; *Texas Co.* v. *McCanless*, 177 Tenn. 238. If there be any doubt, it is fair to hold the State to this view, since it deliberately refrained from assessing the tax during the period of Esso's arrangement with the United States, when other plans could have been made if the tax were levied, or an attempt could have been made to obtain immunizing legislation.

B. It is no longer open to debate that a tax on Government property or on the Government itself violates the Federal Constitution. See, *e. g.*, *Mayo* v. *United States*, 319 U. S. 441; *United States* v. *Allegheny County*, 322 U. S. 174. The fact that the tax is collected from Esso, a bailee which had temporary possession of the Government's property, rather than from the United States; does not destroy the immunity, as the *Allegheny County* and a host of earlier decisions prove.

C. The rulings on which Tennessee relies (*e. g., James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Alabama* v. *King & Boozer*, 314 U. S. 1; *Curry* v. *United States*, 314 U. S. 14) do not support the decision below. In all of those cases, the exaction was found to be actually levied on the contractor, or his "own property, profits, or purchases" (322 U. S. at 186), and was sustained for that reason alone. Here, as in the *Allegheny County* case, we have the contrary situation—a statutory scheme which makes Esso a conduit for taxing the Government's use of gasoline or the gasoline itself.

II

Even if the tax would not be invalid if fairly laid on others in similar circumstances, it is illegal here since the State Supreme Court has unconstitutionally discriminated to the disadvantage of the United States and Esso by looking to the ownership of the gasoline to determine taxability in comparable cases where the United States is not concerned (*Tennessee Oil Co.* v. *McCanless*, 178 Tenn. 683), but looking solely to the storer or distributor in this case where the United States is the owner. No reason for this difference can be given except the desire to claim a tax which would otherwise be uncollectible. It is fundamental in our federal system that a state's taxing laws may not discriminate against the United States or its contractors. *E. g., New York* v. *United States*, 326 U. S. 572, 575–6, 584–5; *Miller* v. *Milwaukee*, 272 U. S. 713.

ARGUMENT

I

THE TENNESSEE GASOLINE TAX, ASSESSED AND COLLECTED FROM A GOVERNMENT CONTRACTOR STORING GASOLINE FOR THE UNITED STATES, IS INVALID UNDER THE FEDERAL CONSTITUTION TO THE EXTENT ASSESSED WITH RESPECT TO GASOLINE OWNED BY THE UNITED STATES

Tennessee has imposed a tax of 7 cents a gallon with respect to Government-owned gasoline for the storing of which Esso ordinarily received only a fraction of a cent per gallon. That the gasoline was at all times Government-owned is not disputed, and was expressly found by the trial court. (R. 314, 317.) The United States was the consignee of the shipments by which the gasoline came into Tennessee for storage (R. 317), and it was the consignee of the shipments by which the gasoline was distributed to various Air Force bases (R. 6–7, 314). What Esso did was simply to store the Government gasoline and then to arrange for its delivery in response to requisitions by Air Force supply officers. *Supra*, pp. 4–6. Esso's charges varied from .18 cents to slightly over 6 cents per gallon, depending upon the extent of Esso's services,[5] but during January 1944 all

[5] The higher charges were for delivery by Esso's own trucks, and the lower charges were for delivery by Government conveyance or commercial carrier (R. 18, 350–358, 362–366).

but a small amount was charged at a fraction of a cent (R. 441–443). The bulk of the payments were at the two lowest rates of .3 and .18 cents (R. 441–442). See Esso's Brief in No. 330, at pp. 15–16.

A further fact requires brief notice. By force of provisions in the contracts, the Government was required to reimburse Esso for "all applicable and valid state or local taxes, fees, and charges". *Supra*, p. 3. If the tax here involved is valid, it will be the Government, not Esso, which is out of pocket. This fact was important in supporting the right of the United States to intervene in the state court (R. 45–46). But our position is, of course, that the immunity of the Government's property from state taxation does not rest on the contractual obligation of reimbursement. The immunity arises because, though the tax is sought to be supported as a privilege tax on Esso's business as a bailee of gasoline, in this case it actually and in full effect amounts to an imposition upon the Government itself or upon the Government's property.

A. THE TAX IS EITHER UPON THE GOVERNMENT OR UPON THE GOVERNMENT'S GASOLINE

1. The tax was assessed under the purported authority of Sections 1126 *et seq.* of the Tennessee Code (Appendix, *infra*, pp. 54 *ff*). Section 1127 imposes "a special privilege tax" on "distributors" for "engaging in and carrying on such

business". Section 1126 defines a distributor as including—

> every person who engages in the business in the state of refining, manufacturing, producing, or compounding gasoline * * *, and selling or storing the same in this state; and also every person who engages in the business in this state of transporting, importing, or causing to be imported, gasoline * * * in this state, and distributing, storing, or making original sales of the same in this state, for any purpose whatsoever.

Section 1128 imposes a similar tax on a "dealer", "provided that gasoline or distillate previously identified as a measure of tax liability of a registered distributor shall not be included in the measure of such dealer's tax liability". And "dealer" is defined broadly in Section 1126 to cover all others than "distributors", including ultimate users or consumers (*infra*, pp. 54–55).

The State Supreme Court characterized this tax as on the "privilege" of "engaging in the business of storing gasoline based on the number of gallons in storage" (R. 8–9), and the statute refers to the levy as a "special privilege tax" (Sections 1127 and 1128, *infra*, pp. 55, 56). But this Court, in passing upon questions under the Federal Constitution, is entirely free to disregard such designations and characterizations, and to decide for itself the real incidence, nature, operation and

impact of the tax. *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, 338 U. S. 665, 674; *United States* v. *Allegheny County*, 332 U. S. 174, 184; *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69, 84; *Wisconsin* v. *J. S. Penney Co.*, 311 U. S. 435, 443; *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 476; *Carpenter* v. *Shaw*, 280 U. S. 363, 367–368; *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 625, 626.[6] The Court's inquiry, as these cases show, goes to substance rather than form, to practical operation and effect rather than nomenclature, to realities and not to labels. "The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents * * *". *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, 292.[7] Cf. for similar statements, *Madison Suburban Utility Dist.* v. *Carson*, 191 Tenn. 300, 307–308; *Howard* v. *Commissioners*

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[6] See also, to the same effect, *Schuykill Trust Co.* v. *Pennsylvania*, 296 U. S. 113, 119; *Senior* v. *Braden*, 295 U. S. 422, 429; *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276, 280; *Storaasli* v. *Minnesota*, 283 U. S. 57, 62; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 387–388; *Hanover Ins. Co.* v. *Harding*, 272 U. S. 494, 509–510; *Shaffer* v. *Carter*, 252 U. S. 37, 55; *Kansas City Ry.* v. *Kansas*, 240 U. S. 227, 231; *St. Louis, S. W. Ry.* v. *Arkansas*, 235 U. S. 350, 362–363; *Choctaw & Gulf R. R.* v. *Harrison*, 235 U. S. 292, 298; *Galveston, Harrisburg & San Antonio Ry.* v. *Texas*, 210 U. S. 217, 227.

[7] In the *Dawson* case, the Court indicated that a decision by the highest court of the state on the true character of the tax would be conclusive (255 U. S. at 292), but that was because it was measuring the tax against a provision of the state constitution.

of the Sinking Fund of the City of Louisville, this Term, No. 295, decided February 9, 1953, slip op., p. 5.

2. In determining the true character of the particular Tennessee gasoline tax which was applied and enforced in this case, the greatest sources of light are the history of the tax and the comprehensive system of gasoline taxation of which it forms an integral part. "A taxing statute, like others, must be read as a whole, as it stands on the statute books at its applicable date, and the legislative purpose in enacting it must be taken, regardless of forms of words, to envisage the obvious consequences which flow from its operation." *Pacific Co,* v. *Johnson,* 285 U. S. 480, 495. See also *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472, 479–480; *Henneford* v. *Silas Mason Co.,* 300 U. S. 577, 583–585; *Douglas Aircraft Co.* v. *Johnson,* 13 Cal. 2d 545; *cf. New Orleans* v. *Houston,* 119 U. S. 265, 278; *Home Insurance Co.* v. *New York,* 134 U. S. 594.[8]

Realistically viewed as a whole in the light of the consistent line of their development, the composite group of Tennessee gasoline tax laws operates collectively as a tax on each gallon of gasoline

[8] The Tennessee legislature often speaks of the gasoline tax statutes collectively. See Chapter 117 of the Public Acts of Tennessee of 1941 which refers to the State Gasoline Tax in capital letters, and Chapter 15, Section 1, of the Public Acts of 1945, which states that if a person stores, unloads or sells any fluid without having it inspected, the fluid "shall be subject *to the gasoline tax.*" [Italics supplied.]

or as an excise on the consumer's use of each gallon of gasoline, but with advance collection from the large refiner or distributor whenever administratively convenient and feasible. As applied here, the state's gasoline tax represented either a tax on federally-owned gasoline or a tax on the United States for using and consuming gasoline. This is shown by a survey of the development of the Tennessee gasoline tax system which reveals that the tax imposed on Esso, though called "a special privilege tax" for storage, is in practical operation and effect a tax on the gasoline or on its use by the gasoline's owner.

The Tennessee gasoline tax levied by Chapter 58 of the Public Acts of 1923 applied to sales and placed no tax on storage. However, the Public Acts of 1925, Chapter 68, extended the scope of the Act of 1923 to include not only those engaged in selling gasoline, but also those engaged in storing it and then withdrawing it for sale or other use. The Supreme Court of Tennessee explained the purpose of the 1925 Act, in *Foster & Creighton Co.* v. *Graham*, 154 Tenn. 412, 419–420, by saying—

> We think the effect of the amendatory act of 1925, when properly interpreted, is to reach gasoline that is stored and thereafter withdrawn and used without being sold by any person, etc.

Under the act of 1923, a large consumer of gasoline, desiring to escape the tax

levied by the act, could do so by buying his gasoline in quantities, say in tank lots, storing it, thereafter withdrawing it, and using it as needed. In such case there would be no intrastate sale or distribution within the meaning of said act, and such consumer would not, therefore, be subject to the tax.

It was manifestly the purpose of the legislature in passing the amendatory act to cut off this avenue through which *large consumers* might evade the tax.

We think the act, when properly interpreted, not only applies to distributors and dealers in gasoline, but *applies to consumers who purchase gasoline in interstate commerce and store it, and thereafter distribute the same, or allow the same to be withdrawn from storage, whether such withdrawal be for sale or other use.* * * * [Italics supplied.]

The gasoline tax was incorporated into the revised Tennessee Code in 1932, beginning with Section 1126 of the Code, but by Chapter 130 of the Public Acts of 1933, the legislature amended the various sections "so as to provide that the gasoline tax * * * should be paid by dealers and distributors according to the amount held in storage in the state, instead of according to the number of gallons withdrawn from storage, as provided by the Code." *Texas Co.* v. *Fort*, 168 Tenn. 679, 681. In the *Texas Co.* case (p. 686), as in earlier decisions (*Foster & Creighton*

Co. v. *Graham,* 154 Tenn. 412, and *Quick Service Tire Co.* v. *Smith,* 156 Tenn. 96, 102), the State Supreme Court characterized the gasoline tax as imposed on the "privilege" of engaging in the business of storing, but it is noteworthy that in each case the gasoline was being stored by, and taxed to, its owner, and the Supreme Court recognized in its *Foster & Creighton Co.* opinion that the legislature was attempting to prevent avoidance of the tax by *large users and consumers* (see *supra,* pp. 21–22).[9]

Significantly, Chapter 202 of the Public Acts of 1937 changed the definition of a "dealer" in Section 1126 of the Tennessee Code to include "every person who uses or consumes gasoline * * * *when such gasoline has not previously been the measure of a privilege tax under this statute*" (*infra,* pp. 54–55 [Italics supplied]), and imposed the gasoline tax under Section 1128 of the Code on "dealers" as so defined. This was subject to the proviso that gasoline already "identified as a

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[9] In *Tennessee Oil Co.* v. *McCanless,* 178 Tenn. 683, 691, 692 (1941), the State Supreme Court referred to the tax as if it were imposed on the gasoline. See *infra,* pp. 29, 46–47.

In *Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U. S. 249, 265, involving the owner of the gasoline sought to be taxed, this Court followed the state court in declaring that "storage of the gasoline and withdrawal of it from storage within the state for use or sale" are the events calling the statute into operation. But the Court also pointed out (pp. 267–268) that the state could tax the railroad's property and was here merely taxing a "right or power incident to appellant's *ownership of the gasoline.*" [Italics supplied.]

measure of tax liability of a registered distributor shall not be included in the measure of said dealer's tax liability" (*infra*, p. 56). Obviously this tax upon "dealers"—artificially and all-inclusively defined—amounts to an excise on the use of gasoline by the ultimate consumer, but with an exception if there has been advance collection from any other "dealer" or "distributor". So, too, in the case of those other than the final consumer, if the tax has already been paid, there is no subsequent levy.

As now constituted (and as it was in 1944), it is clear that the Tennessee gasoline tax is not a tax upon the business or occupation of storing or distributing gasoline. The dominating thrust of the statute is that a tax must be paid for each gallon of gasoline, but it need be paid only once, and if the tax has not been paid by the time the gasoline reaches the ultimate consumer, he is liable for it—in his statutory guise of "dealer". As for storage, there is no real attempt to tax that "occupation" or "privilege". A particular lot of gasoline may pass through a dozen storage depots or tank farms without one of them being obliged to pay the tax. The only storer required to do so is the one who first stores gasoline *on which no tax has previously been paid.* Or, if the tax is paid for the manufacturing of gasoline in the State, then no one pays a tax for the privilege of storing. The designation of the tax as on "storage" is no more

than a partial and incomplete device to assure the payment of the seven cents tax for each gallon. Where that payment is otherwise assured, the "privilege of storing" is wholly forgotten.

That the tax is in reality not a tax on storage is further demonstrated by Chapter 288 of the Public Acts of 1937, which provided:

> SECTION 1. * * *
>
> 1128)1 The tax on all gasoline, other than on gasoline as defined in Section 1126, subsection (a) of the fifth paragraph [10] shall be *refunded when used for industrial purposes* and not used in internal combustion engines, subject to such general limitations and regulations as the Commissioner may prescribe. * * * [Italics supplied.]

If the impost were truly a tax on the privilege of storing, the legislature would not provide for a refund to be made to users, even a limited category, based on how the fuel is used. An ultimate consumer's disposition of fuel has no normal relationship to a fuel storage business operated by some third party at a distribution stage prior to

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[10] The fifth paragraph of Section 1126 reads:

"The term 'gasoline' means and includes (a) the volatile substance produced from petroleum, natural gas, oil shales, or coal heretofore sold under the name of gasoline, (b) any volatile substance or product less than 112 Fahrenheit flash test when tested in a manner approved by United States bureau of mines derived wholly or in part from petroleum, natural gas, oil shales, or coal, and (c) benzol and/or any other volatile substance used wholly or in combination with gasoline as a liquid fuel."

consumption. This exception for use "for industrial purposes and [when] not used in internal combustion engines" unmistakably indicates the overriding legislative purpose to tax each gallon used to propel vehicles.

The export exemption furnishes another proof that the tax has no real relation to storage but amounts either to a tax on each gallon or on the user. In 1943, the legislature passed Chapter 50 of the Public Acts of 1943,[11] which provided in Section 4 (*infra*, p. 68) that—

> all gasoline or other volatile substances as described in this Act *which are exported* to points outside the State, shall only be liable for the inspection fee of one-twentieth of one cent per gallon as levied in Section 1 of this Act, and *there shall be no liability for gasoline taxes levied under the Code of Tennessee, Sections 1126–1148.3 inclusive,* * * * [Italics supplied.]

This exception also strongly suggests an intention not to tax the privilege of storing gasoline, since the legislature here exempts from all tax a sizeable amount of gasoline stored in Tennessee, undoubtedly to aid the state's gasoline storage and export business. Otherwise, gasoline tem-

[11] Section 3 of this Act (*infra*, p. 68) lifted the requirements, previously imposed by Section 1140 of the Tennessee Code (*infra*, pp. 62–63), that gasoline must be stored in separate export tanks and actually exported within 60 days to be excluded from the gasoline tax. Note that, from 1923, there has never been a storage tax, as such, on export gasoline.

porarily stored in Tennessee and later sold in another state would have been subject to two state gasoline taxes and consequently be effectively priced out of the market in the second state.

Section 1130 of the Tennessee Code (*infra*, p. 58) provides for an allowance to the distributor covering loss of gallonage resulting from evaporation, handling, and unloading. The allowance is provided as a deduction, so that only the gasoline which leaves the distributor's tanks is actually taxed. The number of gallons put into storage is only used incidentally as a starting point in the tax calculation. This provision, too, is evidence that the legislature is concerned not with storage but with the number of gallons of gasoline leaving the hands of the distributor and flowing into the channels of distribution to the ultimate consumer for use in internal combustion engines.

The same dominating motives run through later enactments. In 1947, the legislature provided by Chapter 21 of the Public Acts of 1947 for the refund of gasoline taxes, less one cent, to anyone who uses tax-paid gasoline for agricultural purposes, and two years later, by Chapter 34 of the Public Acts of 1949, it exempted aviation gasoline from the gasoline tax completely. These amendments furnish further evidence of a continuing lack of purpose to tax the business of storing gasoline.

Then, by Chapter 168, Public Acts of 1947, the state's lawmakers declared:

> AN ACT To declare the liability for or incidence of certain taxes levied by the State of Tennessee
>
> SECTION 1. * * * *That the liability for, or the incidence of, the gasoline tax is hereby declared to be a levy on the consumer.* The distributors shall add the amount of gasoline taxes presently levied to the price of such gasoline and the distributor may state the amount of the taxes separately from the price of such gasoline on all price display signs, sales or delivery slips, bill and statements which advertise or indicate the price of such gasoline. The provisions of this Section shall in *no way affect the method of collection of said gasoline taxes as provided by existing law.* [Italics supplied]

This statute, explicitly declaring that the tax is levied on the *consumer*, did nothing to change the existing sections of the Tennessee Code or other statutory law, nor the methods of collection. It merely put specifically into the gasoline tax law what had long been implicit—that the tax is not in reality on storage but is a levy on the gasoline itself or on the user of the gasoline, with a complex system of advance collection for the administrative convenience of securing payment as early and easily and in as large amounts as possible.[12]

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[12] Prior to 1944 (the year involved here), the Bureau of Internal Revenue had ruled that for federal income tax

The legislature was only formally recognizing in 1947, what the State Supreme Court had held in 1941, when instead of the "privilege of storing", it spoke of the gasoline itself as tax-free or not tax-free, and as exempt or not exempt from the tax, and held that the state could not "impose a *tax on the gasoline* in question" (*Tennessee Oil Co.* v. *McCanless*, 178 Tenn. 683, 690, 691, 692, italics supplied) (see *infra*, pp. 45–49).[13]

On this view, the tax here was, despite the formal words of the statute, actually levied either on the Government-owned gasoline or on the Government as user and consumer, and not at all on Esso's "privilege of storage".[14]

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purposes the Tennessee gasoline tax is levied on the consumer, and is therefore deductible by the consumer under the general tax deduction provisions of Section 23 (c) (1) of the Internal Revenue Code, relating to deduction of taxes. See I. T. 3616, 1943 Cum. Bull. 136.

[13] And in *Texas Co.* v. *McCanless*, 177 Tenn. 238, the Supreme Court held that the gasoline tax involved here is *in pari materia* with the inspection tax which it held, in the opinion below (R. 8), to be an *excise on the gasoline*, and therefore invalid as assessed with respect to federal property (*supra*, p. 7, fn. 3, italics supplied).

[14] In the state courts, Esso argued that under the literal terms of the statute, no tax could be assessed against it under the type of contract involved here. Its contentions were that (a) it was not liable as a "distributor" (under Section 1127) because though it was a storer it neither manufactured, produced, or compounded this gasoline within the state, nor did it ship, transport, or import the gasoline into the state (see R. 14–16), and (b) it was not liable as a "dealer" (under Section 1128) because it did not come within the statutory definition of "dealer". Esso's conclusion was that,

3. Another important reason for casting aside the State's characterization of the levy as laid on the right of storage is the amount of the tax. It is difficult to reconcile a tax of seven cents a gallon with the claim that it constitutes a tax on the privilege of engaging in the business of storing that gasoline. The rate is far out of proportion to the fraction of a cent per gallon normally charged the United States by Esso. Yet there is no claim that the transaction between the Government and Esso was not a bona fide one entered into at arm's length and in good faith. Indeed, the State Supreme Court speaks of the charge as a "very substantial and lucrative business" for Esso (R. 9). Of course, this would not be the case were it not for the United States' agreement to assume the burden of any taxes levied.[15] We think immaterial, however, the contractual right of reimbursement Esso has from the Government under the contracts. The operation and effect of the gasoline tax should be adjudged

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if it had made a similar arrangement with a private owner, it would not be subject to the tax, but the gasoline would not have escaped taxation because the private owner would have been liable, under Sections 1126 and 1128, as a "dealer". Though these contentions have support in the statutory language and the admitted facts of this case, they were summarily rejected, without much explanation, by the courts below (see R. 9, 24–25, 317).

[15] Esso's gross receipts from the United States, under its contracts, amounted to less than $13,000 for the month of January 1944 (R. 441–443), while the gasoline tax for that period amounts to almost $196,850 (R. 319).

without reference to these contracts. Certainly the assessment of a state tax otherwise invalid cannot be rendered valid and constitutional by a contractual agreement to reimburse the contractor against whom it is assessed, no more than the fact that an otherwise valid state tax upon a government contractor is rendered invalid by the Government's contract and obligation to reimburse him. *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 160; *Alabama* v. *King & Boozer*, 314 U. S. 1, 14; *Curry* v. *United States*, 314 U. S. 14, 18.

That the description of the tax as a "privilege tax on engaging in the business of storing gasoline" (R. 8) is a misnomer can be readily seen from relevant petroleum industry figures of gasoline prices for the month of January 1944. These figures (taken from the Gasoline Index of the National Petroleum News) are as follows: [16]

[Cents per gallon]

	Tank car [1]	Dealer tank wagon [2]	Spread
January 3, 1944	6.64	10.43	3.79
January 10, 1944	6.66	10.43	3.77
January 17, 1944	6.66	10.43	3.77
January 24, 1944	6.66	10.43	3.77
January 31, 1944	6.66	10.43	3.77

[1] The tank car index is the weighted average of the following wholesale markets for regular grade gasoline, f. o. b. refineries or terminals: Oklahoma, Mid-Western, Western Pennsylvania, California, New York Harbor, Philadelphia, Jacksonville, Boston, and Gulf Coast.

[2] The dealer index is an average of "undivided" dealer prices, ex-tax, in 50 cities.

[16] These figures are compiled from the National Petroleum News of January 5, p. 44; January 12, p. 44; January 19, p. 47; January 26, p. 47; and February 2, 1944, p. 43.

The last column represents the difference between what an independent jobber paid for gasoline, f. o. b. refinery or terminal, and the price he could obtain from a filling station operator. It is the margin which covers transportation costs to the jobber's tank farm and thence to the filling station, tank-farm storage costs, handling costs, and profit.

The relevance of these figures to this case lies in the fact that Esso's contractual obligations were somewhat similar to the functions performed by the independent jobber, except for the Government's bearing the cost of transportation to Esso's tanks. Aviation gasoline is normally handled in much the same manner as automobile gasoline and with the same equipment and personnel.[17] The costs of handling and storing the two fuels are comparable. Assuming a spread of as high as five cents per gallon on aviation fuel, it is apparent that a tax of seven cents per gallon is far too high to be considered a tax on the business of storing or handling either motor or aviation gasoline;

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[17] *Aviation Fuels and Their Effects on Engine Performance*, p. 9 (1951), prepared by the Ethyl Corporation states that "aviation gasolines are no more dangerous than motor gasolines which have about the same vapor pressure". Interstate Commerce Commissioner Regulations make no distinction in the handling of the two types of fuel. 49 C. F. R. 119 (1950 Revision of 1949 Edition). The Standards of the National Board of Fire Underwriters for the Storage, Handling and Use of Flammable Liquids, April, 1952, make no distinction between the two fuels.

the tax would invariably eat up the jobber's entire margin before any of his costs were covered.

A heavy tax of this character, measured solely by gallonage which may be owned by someone else and taking no account of the storer's gross or net receipts,[18] or his expenses, or the duration of the storage, can hardly be said to tax the business of storing—unless it were the state's aim to drive storers out of business. However, there has obviously been no such intent on the part of the legislature. On the contrary, the exemption of gasoline destined for export[19] is proof of a positive legislative desire to protect the gasoline storage business in the state. Furthermore, a prohibitive privilege tax would not accord with Tennessee's conception that in a true privilege tax the occupation is one "in which a *profit* is supposed to be derived by its exercise from the general public". *Draughon* v. *Fox-Pelletier Corp.*, 174 Tenn. 457, 467 [Italics supplied]. The position of the tax in the Tennessee Code underscores this point, it being placed not in the sections imposing a privilege tax on "Occupations and Businesses", which begin with Section 1248.1 of the Code, but rather in a separate part beginning with Section 1126, devoted exclusively to the "Gasoline Tax."

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[18] See fn. 15, *supra*, p. 30.

[19] See *supra*, pp. 26–27.

The combination of all these factors—the well-devised system of available exemptions if the tax has previously been paid, the assurance that the tax need be paid only once, the possibilities of refund to consumers depending on their use of the gasoline, the allowance for spillage and evaporation losses, the exemptions for export and for agricultural or industrial uses, the inordinate size of the tax if it really taxed storage, the 1947 legislative declaration that the tax is a levy on the consumer, and the location of the tax in Tennessee's codified tax system—demonstrate that the Tennessee Gasoline Tax, as applied here, is not a tax on the privilege of storing but an excise on the gasoline itself or on the gasoline's consumer.[20] And it is fair and appropriate to resolve against the State any doubts as to the real nature and impact of the tax, since the State it-

[20] It makes no difference that for the purposes of the state constitution the tax may be held *not* to be laid on the gasoline or on the user [see *Foster & Creighton Co.* v. *Graham*, 154 Tenn. 412, and the opinion below, with which contrast *Tennessee Oil Co.* v. *McCanless*, 178 Tenn. 683, and *Texas Co.* v. *McCanless*, 177 Tenn. 238 (*supra*, p. 29)]. The status of the tax *for federal purposes* is independent of its standing under state law. See *Howard* v. *Commissioners of the Sinking Fund of the City of Louisville*, this Term, No. 295, decided February 9, 1953, slip op., p. 5, and cases cited *supra*, p. 19.

Furthermore, it is relevant to stress that the Tennessee Supreme Court has described these gasoline taxes in different terms at different times. As suggested in the preceding paragraph, the tax involved here has been said by that court

self made clear to Esso and the United States, during the critical period, that the tax would not be levied, and thereby made it unnecessary for the parties to the arrangement to modify its form or terminate it, or to obtain a possible Congressional exemption (*supra*, p. 7).

B. A TAX ON GOVERNMENT GASOLINE OR ON THE GOVERNMENT ITSELF IS INVALID EVEN IF COLLECTED THROUGH A PRIVATE PERSON

As was pointed out in *United States* v. *Allegheny County*, 322 U. S. 174, 176–177, since *McCulloch* v. *Maryland*, 4 Wheat. 316, no decision of the Court has questioned that, in the absence of Congressional consent, the Government's activities and property, real and personal, are immune from taxation by the states and their political subdivisions.[21] The *Allegheny County* decision (see 322 U. S. at 177, 189, 192) and *Mayo* v. *United States*, 319 U. S. 441, 447–448, suffice to show that the principle is still applied

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to be imposed on the privilege of storing and also said to be laid on the gasoline itself. And the inspection tax invalidated as applied here (*supra*, pp. 7, fn. 3, 29) was described in the opinion below as an "excise tax on the commodity" itself (R. 8), but has also been said to be an "excise tax on the sale, use or storage" of the gasoline. *State* v. *Nashville, C. & L. Ry. Co.*, 176 Tenn. 24, 28; *Texas Co.* v. *McCanless*, 177 Tenn. 238, 241; R. 316 (opinion of Chancery Court).

[21] Two unreported cases to the contrary were apparently affirmed by an equally divided Court at the December Term, 1849. Their facts are stated in *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 175–177, but, as pointed out therein, they have no weight as authority.

with undiminished vigor. It automatically follows from this controlling rule that the Tennessee tax cannot withstand attack, if, as we urge above, it is actually levied in this instance on Federal property [22] or on the United States itself.[23]

[22] Of course, it is irrelevant that the tax is a flat one and not *ad valorem*. As indicated in fn. 20, *supra*, Tennessee recognizes the concept of an excise tax on property. See the portion of the opinion below which invalidated the inspection tax (*supra*, p. 7) (R. 8).

[23] Tennessee cannot support the tax, as applied here, on the theory that its general police power authorizes it to control or tax a volatile, inflammable substance like gasoline, even as against the United States—nor did the state courts seek to rest on that ground (see R. 8, 12, 314–317). Under the principle of federal immunity, a state is wholly disqualified from interfering with the property, operations, or functions of the United States. Because the United States "may perform its functions without conforming to the police regulations of a State", it may construct a dam and reservoir in a state without securing approval of its plans and specifications by the state engineer as required by state statute (*Arizona* v. *California*, 283 U. S. 423, 451); and it may operate soldiers' homes without complying with state inspection or police regulations (*Ohio* v. *Thomas*, 173 U. S. 276). So, too, the driver of a mail truck for the Post Office Department cannot be required to comply with state driving-license requirements (*Johnson* v. *Maryland*, 254 U. S. 51; cf. *Railroad Co.* v. *Lichtenberg*, 176 Md. 383, appeal dismissed, 308 U. S. 525), nor may federal agents in a national forest and game preserve be subject to the hunting restrictions of the state in which preserve is located (*Hunt* v. *United States*, 278 U. S. 96). These cases ar controlling. They have not lost their vitality, but, indeed, were cited with approval by this Court in *Penn Dairies, Inc.* v. *Milk Control Comm'n*, 318 U. S. 261, 269, and the principle was categorically reaffirmed in *Mayo* v. *United States*, 319 U. S. 441, "Whatever jurisdiction the State may have over the place

No problem is raised by the circumstance that the tax is collected from Esso rather than from the United States. Of the many cases holding the Government's property immune from state taxation, only two (*Clallam County* v. *United States,* 263 U. S. 341, and *Mayo* v. *United States,* 319 U. S. 441) involved attempts to collect taxes or fees directly from the United States. In the other cases, the local authority proceeded for collection against a private person. For instance, in *Van Brocklin* v. *Tennessee,* 117 U. S. 151, which is typical of several, the United States obtained title to three lots upon nonpayment of federal taxes, and held them for some 13 years. After one lot had been redeemed by Van Brocklin and the others sold, the state brought a bill in equity against Van Brocklin and the purchaser to enforce by sale liens for taxes assessed with respect to the years when title was in the United States. It was held that the property was not subject to the asserted liens. See also, *e. g., Lee* v. *Osceola Imp. Dist.,* 268 U. S. 643; *Mullen Benevolent Corp.* v. *United States,* 290 U. S. 89;

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or ground where the institution is located, it can have none to interfere with the provision made by Congress for furnishing food to the inmates of the home, nor has it power to prohibit or regulate the furnishing of any article of food which is approved by the officers of the home, by the board of managers and by Congress. Under such circumstances the police power of the State has no application". *Ohio* v. *Thomas,* 173 U. S. 276, 283. See also *United States* v. *Allegheny County,* 322 U. S. 174, 176–177.

Maricopa County v. *Valley Bank*, 318 U. S. 357.[24] Even though the state proceeds solely against the private person, it is the Government or its property which is in effect being taxed. Indeed, the private individual would be unlikely to proceed unless the Government first assumed the liability for the tax, just as the "numerous persons" referred to in the *Mayo* case (319 U. S., at 443) were unwilling "to proceed with the distribution of the fertilizer" without protection from the Florida statute. Such an agreement of indemnification was given Esso in the instant case by its contract (*supra*, pp. 3, 17), for much the same reason. And in all of these situations the Government, as the real party in interest, is

[24] Other cases invalidating tax assessments against third persons are: *Railway Co.* v. *Prescott*, 16 Wall. 603; *Railway Co.* v. *McShane*, 22 Wall. 444; *Colorado Co.* v. *Commissioners*, 95 U. S. 259; *Sargent* v. *Herrick*, 221 U. S. 404; *Hussman* v. *Durham*, 165 U. S. 144; *Northern Pacific R. R. Co.* v. *Traill County*, 115 U. S. 600.

In *Mayo* v. *United States*, 319 U. S. 441, the state's "stop sale" notice was directed to a federal instrumentality, the county agricultural association, rather than to a private person. But it is perfectly clear from the opinion that the state's action would not have been viewed in a more favorable light had the state officials waited until the bags of fertilizer were in the hands of the farmers, and then seized and sold them for lack of labels evidencing payment of the inspection fee. The District Court's decree, affirmed by this Court, was sufficiently broad to prevent such interference with the Government's program at any point. See Record in No. 726, October Term, 1942, pp. 116–117. The Court's opinion cited with approval the *Van Brocklin* case (319 U. S., p. 447, fn. 11).

subjected to the same administrative and fiscal burdens as though the tax were collected directly from the Treasury.[25]

United States v. *Allegheny County*, 322 U. S. 174, is a closely comparable and recent decision. Real property was owned by Mesta Machine Company, a Government contractor, and affixed machinery belonged to the United States. The tax sought to be collected from Mesta related to the United States' machinery but the county sought to justify it on the ground that it was formally levied on Mesta's realty and was merely measured or enhanced by the Government's personalty. Looking at the tax for itself, this Court determined that the substance of the imposition was on the Government's property and therefore invalid. Emphasizing that neither ingenuity in calculation nor form of words in state enactments can deprive the United States of its well-established immunity from state taxation, the Court made several definitive declarations which are entirely *a propos* re (pp. 187–188, 188–189, 192):

> We think, however, that *the Government's property interests are not taxable*

[25] In other types of cases, the Court has also recognized (*Colorado Bank* v. *Bedford*, 310 U. S. 41, 52) that—

"The person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself."

See *Stahmann* v. *Vidal*, 305 U. S. 61; *McGoldrick* v. *Berwind-White Coal Co.*, 309 U. S. 33, 43, 49; *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 361–362, 363–364.

either to it or its bailee. The "Government" is an abstraction, and its possession of property largely constructive. Actual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its behalf and for its purposes. He may be an officer, an agent, or a contractor. His personal advantages from the relationship by way of salary, profit, or beneficial personal use of the property may be taxed as we have held. *But neither he nor the Government can be taxed for the Government's property interest.* Rarely does a State or municipality pursue the Federal Government itself. Most of the immunity cases we have been called upon to deal with involved assertion of a right to tax Government property against an individual.

* * * * *

A State may tax personal property and might well tax it to one in whose possession it was found, but it could hardly tax one of its citizens because of moneys of the United States which were in his possession as Collector of Internal Revenue, Postmaster, Clerk of the United States Court, or other federal officer, agent, or contractor. *We hold that Government-owned property, to the full extent of the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds it as a bailee.*

* * * * *

> The Tax Law of the Commonwealth of Pennsylvania as interpreted and applied in this case violates the Federal Constitution in so far as it purports to authorize taxation of the *property interests of the United States in the machinery in Mesta's plant, or to use that interest to tax or to enhance the tax upon the Government's bailee.* * * * [Italics supplied.]

In this case, too, the tax is collectible from the contractor-bailee, and is formally designated as imposed on a non-immune subject, *i. e.*, the contractors's privilege of doing business within Tennessee. But, as in *Allegheny County*, the reality is that the tax is laid on Government property or on the Government itself, as consumer and user of the gasoline.

C. THE RULINGS OF THIS COURT ON WHICH TENNESSEE RELIES DO NOT SUPPORT THE DECISION BELOW

None of this Court's decisions brought forward by the State to support the ruling below can serve that function. All involve a tax on a contractor's own advantages from his contract by way of receipts, profit, or beneficial use of property, rather than an impost on the Government or its property.

James v. *Dravo Contracting Co.*, 302 U. S. 134, concerned a tax laid on the Government contractor's gross receipts; there was no claim that the tax was imposed either on the Government's property or on the United States itself. Simi-

larly, the taxes in *Alabama* v. *King & Boozer*, 314 U. S. 1, and *Curry* v. *United States*, 314 U. S. 14, were state sales and use taxes held to be imposed on purchases of materials by a Government cost-plus contractor. As in *Dravo*, the taxes reached only the contractor's purchases and use of the property, not the Government; "the fact that materials are destined to be furnished to the Government does not exempt them from sales taxes imposed on the contractor's vendor" (*United States* v. *Allegheny County*, 322 U. S. 174, 186).[26] In the same category is *Penn Dairies* v. *Milk Control Comm'n*, 318 U. S. 261, which validated price control imposed by a state on a contractor with the United States. The regulation had its direct impact on the contractor; comparable controls attempted to be imposed on the Government would have met the same fate as the regulation overthrown in *Mayo* v. *United States*, 319 U. S. 441. Cf. *Pacific Coast Dairy, Inc.* v. *Dept. of Agriculture*, 318 U. S. 285. Likewise, in *Wilson*

[26] The overruling, in *Alabama* v. *King & Boozer*, 314 U. S. 1, 9 (see *Penn Dairies, Inc.* v. *Milk Control Comm'n*, 318 U. S. 261, 277), of *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, and *Graves* v. *Texas Company*, 298 U. S. 393, involving gasoline taxes denominated as "privilege" taxes, has no bearing on the validity of the present tax. In the *Panhandle Oil* and *Texas Company* cases, the fact that the tax was called a "privilege" tax was unimportant, because the taxpayer-company owned the gasoline which was only later *sold* to the United States. A direct tax on such privately-owned gasoline would today clearly be held valid.

v. *Cook*, 327 U. S. 474, 482–483, sustaining a state privilege tax on one who purchased and severed timber on Government-owned lands, there was no attempt to reach federal property or to tax the timber itself, even though the United States still owned the timber until the purchase price was paid; the Court expressly reserved (because not properly before it) all questions relating to possible liens against, or imposition of the tax upon, the Government (327 U. S. at 483–485).

In all of these cases, "the exactions directly affected persons who were acting for themselves and not for the United States". *Mayo* v. *United States*, 319 U. S. 441, 447. What was denied "is immunity for the contractor's own property, profits, or purchases". *United States* v. *Allegheny County*, 322 U. S. 174, 186. The tax or regulation was imposed on the contractor as part of *his* obligation of citizenship, and it was not the scheme of the statute to make him a mere conduit for the taxation or regulation of the person in the position of the United States. As we have shown (*supra*, pp. 17–35), we have here the contrary situation:—a statutory scheme designed in this instance to make Esso a conduit for taxing the Government as consumer or for taxing its gasoline. No prior decision of this Court permits such a tax and the historical line of authority condemns it.

II

THE TENNESSEE GASOLINE TAX UNCONSTITUTIONALLY DISCRIMINATES AGAINST THE UNITED STATES IN THAT, AS CONSTRUED BY THE STATE SUPREME COURT, IT IMPOSES A TAX WITH RESPECT TO GASOLINE OWNED BY THE UNITED STATES IN CIRCUMSTANCES WHERE THE SAME TAX WOULD NOT BE LEVIED IF OWNED BY OTHERS

A. We urge in Point I that the Tennessee tax would infringe the Federal Government's constitutional immunity even if the tax were fairly levied on others in comparable circumstances. Whether or not that is so, the tax is certainly invalid if it has been applied discriminatorily to the disadvantage of the United States and of Esso. For the unbroken doctrine in this Court is that, whatever a State's taxing laws may do, they cannot discriminate against the United States or against private persons who deal or contract with the United States. Such discrimination is outlawed by the Supremacy Clause and by the constitutional implications of our federal system, as well as by the Equal Protection Clause of the Fourteenth Amendment. *New York* v. *United States*, 326 U. S. 572, 575–576, 584–585, 586; *Penn Dairies, Inc.* v. *Milk Control Comm'n*, 318 U. S. 261, 269; *Alabama* v. *King & Boozer*, 314 U. S. 1, 8; *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 480, 488; *Helvering* v. *Gerhardt*, 304 U. S. 405, 413, 420, 425; *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, 385, 386; *James* v.

Dravo Contracting Co., 302 U. S. 134, 149, 157, 158, 164 (fn. 13), 170–171, 172; *Taber* v. *Indian Territory Co.*, 300 U. S. 1; *Schuylkill Trust Co.* v. *Pennsylvania*, 296 U. S. 113, 120; *Indian Territory Oil Co.* v. *Board*, 288 U. S. 325, 327–328; *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 131; *Pacific Co.* v. *Johnson*, 285 U. S. 480, 493–495, 496; *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279, 282; *Alward* v. *Johnson*, 282 U. S. 509, 513–514; *Willcuts* v. *Bunn*, 282 U. S. 216, 225, 226, 229; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 392; *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 631–632; *Miller* v. *Milwaukee*, 272 U. S. 713, 715; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 525.[27]

Such an invalid discrimination is revealed by the course of decisions of the Tennessee Supreme Court. In *Tennessee Oil Co.* v. *McCanless*, 178 Tenn. 683, in 1941, the Supreme Court held the Tennessee gasoline tax inapplicable to a situation hardly distinguishable in pertinent facts from this one—except that the United States was not involved. The Obion County Board made an arrangement with an oil company by which the latter procured out-of-state gasoline for the board

[27] See also, to the same effect, the dissenting opinions in *Brush* v. *Commissioner*, 300 U. S. 352, 375, 378; *Schuylkill Trust Co.* v. *Pennsylvania*, 296 U. S. 113, 123 *ff*; *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 638; *National Life Ins. Co.* v. *United States*, 277 U. S. 508, 530–531; *Long* v. *Rockwood*, 277 U. S. 142, 149, 150.

at cost plus freight, had it shipped to Tennessee, stored it in a tank leased to the board for one dollar, and then delivered it on order of the board, at a charge of two cents per gallon. The State taxing authorities sought to tax the oil company with respect to the gasoline. In voiding the tax, the Supreme Court stated (pp. 691–692):

> Counsel for the state concede that gasoline shipped in interstate commerce directly to a county or city and used by such governmental unit for governmental purposes is exempt from the gasoline tax. *State ex rel* v. *Southern Oil Service*, 174 Tenn. 232, 124 S. W. (2d) 704; *State* v. *Hamilton County*, 176 Tenn. 519, 144 S. W. (2d) 749. But, it is insisted the gasoline must be shipped to the governmental unit and controlled by it. *The determinative question is: To whom does the gasoline belong when it comes to rest in the State of Tennessee?* If it belongs to the governmental unit, it is exempt from taxation. The fact that the gasoline here in question was delivered into a tank leased from complainant rather than into a tank owned by the County Board of Education is immaterial. The delivery made passed title to the County Board of Education and complainant's connection thereafter with the gasoline was merely that of agent of the Board to make deliveries as directed by the Board. [Italics supplied.]

Since the board, an exempt agency, owned the gasoline, the State could not "impose a tax on the gasoline in question" (178 Tenn., at 692).

We emphasize that the court held that "The determinative question is: To whom does the gasoline belong when it comes to rest in the State of Tennessee? If it belongs to the governmental unit, it is exempt from taxation." Ownership of the gasoline was held to be the all-important factor in the case of an exempt agency. Furthermore, the court appeared to reject, as tests of taxability, both direct control of the gasoline and ownership of the tank. It mentioned the State's contention that control by the governmental unit was necessary for exemption, saying "it is insisted the gasoline must be shipped to the governmental unit and *controlled* by it." [Italics supplied.] But it ignored this argument in favor of ownership of the gasoline, and then selected title to the gasoline over ownership of the tank, saying that "The fact that the gasoline here in question was delivered into a tank leased from complainant rather than into a tank owned by the County Boar dof Education is immaterial."

In its discussion of the *Tennessee Oil* case in the opinions below (R. 9, 25), the Supreme Court seems to stress the "one-dollar lease" of the tank to the county board as a decisive factor, but in the *Tennessee Oil* case itself it found the "determina-

tive" issue to be the ownership of the gasoline, not of the tank; the lease was considered in the opinion as simply one indication of the ownership of the gasoline (which was not otherwise very clear). Moreover, in *Tennessee Oil* the oil company did the actual handling, storing, and delivering, in addition to keeping records, supplying guards, etc., with its own personnel, just as in the instant case. To make a heavy tax now turn on the existence *vel non* of a formal "one-dollar lease" merely emphasizes the inherent discrimination the court reads into the statute.[28]

The *Tennessee Oil* decision and the instant case, taken together, indicate that where the United States is not concerned the State looks to the ownership of the gasoline to determine taxability—at least where a claim of exemption is made—but where the United States is the

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[28] If the Tennessee taxing authorities, in the period from 1943 to 1946 when the arrangement was operative, had sought to rest the tax on this formal distinction, the United States and Esso would undoubtedly have added a clause to the contracts making such a "one-dollar lease". In that respect, the State Supreme Court's opinion either errs when it says that (R. 10–11) "the record does not show that Esso was prejudiced in any way by a failure to collect the tax", or it means that entering into a "one dollar lease" would not have saved Esso from the tax. As to the latter view, see the argument *infra*, pp. 48–51 on discrimination against Esso and the United States. Esso was further prejudiced by the delay, since, had an earlier attempt been made to collect the tax, Esso would have claimed the lower rate available for export gasoline at the time (see R. 10, 19–20, 25).

owner it looks solely to the storer or distributor.[29] No reason for this difference is or can be given, except the desire to claim a tax which would otherwise be uncollectible. Such unequal treatment of the United States and its contractor, whether by a state legislature or by the state judiciary, must fall under the principle of the cases cited above at pp. 44–45. In *Miller* v. *Milwaukee*, 272 U. S. 713, for example, a Wisconsin tax which included dividends paid to stockholders in their taxable net income only so far as the corporation itself had been exempt from taxation on its income, was held invalid to the extent that the corporation's exemption from taxation arose with respect to income paid upon United States bonds (then exempt from direct income taxation). The Court, speaking through Mr. Justice Holmes, held that the statute indicated an obvious attempt to reach income which was constitutionally exempt, stating (p. 715):

> If the avowed purpose or self-evident operation of a statute is to follow the bonds of the United States and to make up for its inability to reach them directly by indirectly achieving the same result, the statute must fail even if but for its purpose or

[29] In 1941 and 1943, Tennessee amended its statutes to provide special provisions for the exemption of state governmental units (2 Williams Tennessee Code, Sec. 1148.22), but the State Supreme Court did not refer to, or rest on, these provisions.

> special operation it would be perfectly good, Under the laws of Wisconsin the income from the United States bonds may not be the only item exempted from the income tax on corporations, but it certainly is the most conspicuous instance of exemption at the present time. A result intelligently foreseen and offering the most obvious motive for an act that will bring it about, fairly may be taken to have been a purpose of the act. * * * A tax very well may be upheld as against any casual effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them, but it becomes a more serious attack upon their immunity when they are its obvious aim. In such a case the Court must consider the public welfare rather than the artifices contrived for private convenience and must look at the facts.

B. The Equal Protection Clause is also applicable in this case to bar Tennessee from discriminating against Esso by imposing a tax where the State Supreme Court, by adhering in this case to the rationale of the *Tennessee Oil* decision (R. 9, 25), has indicated that for other companies in similar circumstances the tax, if collectible at all, would be on the owner of the gasoline and not on the storer. The differences between the position of the Tennessee Oil Company in the earlier case and of Esso here are so

slight as not to warrant the difference in tax treatment. Both companies were performing the same functions under very similar arrangements (R. 18). See *Hillsborough* v. *Cromwell*, 326 U. S. 620, 623. For elaboration of this argument, see Esso's Brief in No. 330, at pp. 8 *et seq.*

C. These issues of unlawful discrimination were seasonably raised in the state courts. It was argued to the Supreme Court of Tennessee, in Esso's brief on the original hearing, that the court's prior decisions (particularly *Tennessee Oil Co.* v. *McCanless*, 178 Tenn. 683) required a holding that the tax was inapplicable here. The brief added (p. 42): "Necessarily the same rule must be applied when the implied immunity of the United States is involved; otherwise Tennessee has discriminated against the United States." *Tennessee Oil* was apparently the only prior case in which an attempt had been made to assess the gasoline tax against a bailee where the owner was an immune governmental unit. It was to be assumed that the Supreme Court would either overrule that case or apply it. Instead, the court adhered to its decision in the *Tennessee Oil* case, and at the same time affirmed the lower court (which had ignored the *Tennessee Oil* case in its opinion) on the ground that the two cases were distinguishable. When the State Supreme Court refused to apply the *Tennessee Oil* rule to the

instant case, at the same time adhering to its prior decision, the Equal Protection Clause was raised in Esso's petition to rehear (R. 16–19).

The rule which declares ineffective an attempt to raise a federal question in a petition for rehearing yields, of course, to the governing principle that the state practice must afford a litigant an opportunity to have the claimed federal right heard and determined, and that, even if the state court refuses to pass upon the question, the raising will be timely if the question is advanced at the earliest opportunity. Accordingly, the raising of the federal question in a petition for rehearing is timely if it appears that the question was first brought into the case by an unexpected decision of the highest state court and that the litigant had no prior opportunity to assert the claimed federal immunity. *Ohio* v. *Akron Park District,* 281 U. S. 74, 79; *Missouri* v. *Gehner,* 281 U. S. 313, 320; *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673, 677–678; *Cole* v. *Arkansas,* 333 U. S. 196, 200 (with which compare *Cole* v. *Arkansas,* 338 U. S. 345). See *Wilson* v. *Cook,* 327 U. S. 474, 485; *Butler Brothers* v. *McColgan,* 315 U. S. 501, 510; *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 164. See also *Saunders* v. *Shaw,* 244 U. S. 317; *Grannis* v. *Ordean,* 234 U. S. 385, 392. Cf. *Internat. Steel Co.* v. *Surety Co.,* 297 U. S.

657; *Herndon* v. *Georgia*, 295 U. S. 441; *Hartford Life Ins. Co.* v. *Johnson*, 249 U. S. 490.[30]

CONCLUSION

The judgment of the Supreme Court of the State of Tennessee should be reversed.

Respectfully submitted.

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[30] This Court has jurisdiction to consider those issues discussed herein which may not be appealable under 28 U. S. C. 1257 (2), but are reviewable by certiorari under 28 U. S. C. 1257 (3), since all such issues are included in the Assignment of Errors (R. 323–4) (*supra*, pp. 9–11). See *Flournoy* v. *Wiener*, 321 U. S. 253, 263; *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530, 547. See also 28 U. S. C. 2103.

APPENDIX

2 Williams Tennessee Code, Annotated (1934)

GASOLINE TAX

1126. *Definitions.*—As used in this statute the term "person" means and includes every individual, firm, association, joint-stock company, syndicate, and corporation.

The term "distributor" means and includes every person who engages in the business in the state of refining, manufacturing, producing, or compounding gasoline or distillate, and selling or storing the same in this state; and also every person who engages in the business in this state of transporting, importing, or causing to be imported, gasoline or distillate into this state, and distributing, storing, or making original sales of the same in this state, for any purpose whatsoever.

The term "original sales" as used in the definition of "distributor" shall mean the first sale made in this state after gasoline shall have been produced, refined and/or shipped or imported into this state, whether such sale shall be wholesale or retail, and/or to one for resale or use.

The term "dealer" means and includes every person other than a distributor, who engages in the business in this state, of distributing or selling gasoline or distillate within this state, and also every person who uses or consumes gasoline (except use or consumption in interstate commerce) when such gasoline has not previously been the

measure of a privilege tax under this statute.

The term "gasoline" means and includes (a) the volatile substance produced from petroleum, natural gas, oil shales, or coal heretofore sold under the name of gasoline, (b) any volatile substance or product less than 112 Fahrenheit flash test when tested in a manner approved by United States bureau of mines derived wholly or in part from petroleum, natural gas, oil shales, or coal, and (c) benzol and/or any other volatile substance used wholly or in combination with gasoline as a liquid fuel.

The term "gallon" shall mean the amount of gasoline, at a temperature of sixty degrees (60) Fahrenheit, necessary to completely fill a standard United States, gallon liquid measure. (1923, ch. 58, sec. 1; 1925, ch. 20; 1929, ch. 124; 1933, ch. 130, sec. 1; 1937, ch. 202, sec. 1.)

1127. *Distributors tax on gasoline and distillate; original packages excepted; distribution to service stations as sales.*— Every distributor when engaged in such business in this state, shall pay to the state comptroller, through commissioner of finance and taxation, for the exclusive use of the state, a special privilege tax, in addition to all other taxes, for engaging in and carrying on such business in this state, in an amount equal to six cents for each gallon of gasoline, and six cents for each gallon of distillate refined, manufactured, produced, or compounded by such distributor and sold, stored or distributed by him in this state, or shipped, transported or imported by such distributor into, and distributed, stored or sold

by him within this state, during such year; provided that no gasoline or distillate shall be included in the measure of the tax liability of a distributor unless said gasoline or distillate shall have previously come to rest within the meaning of the interstate commerce clause of the federal constitution; provided, further, that all gasoline and distillate distributed by any distributor to any of its service stations in this state shall be deemed to have been sold, and shall be treated in the same manner as though the same had been sold to dealers or other persons. (1923, ch. 58, sec. 2; 1925, chs. 13, 20; 1929, ch. 27; 1931, ch. 40, sec. 1; 1933, ch. 130. sec. 2)*

1128. *Dealer's privilege tax on gasoline and distillate; original packages excepted.*—Every dealer each year, when engaged in such business in this state, shall pay to the state comptroller, through the commissioner of finance and taxation, for the exclusive use of the state, a special privilege tax, in addition to all other taxes, for engaging in such business in this state, equal to six cents for each gallon of gasoline and six cents for each gallon of distillate sold or distributed or stored or used or consumed by such dealer in this state during such year; provided, that gasoline or distillate previously identified as a measure of tax liability of a registered distributor shall not be included in the measure of said dealer's tax liability; pro-

*An additional tax of one (1¢) cent per gallon of gasoline is provided for by the Acts of 1931, Second Extra Session, Chapter 11, and the Acts of 1933, Chapters 103, 117, and 118.

vided, further, that no gasoline or distillate shall be included in the measure of any dealer's tax liability unless said gasoline or distillate shall have previously come to rest within the meaning of the interstate commerce clause of the federal constitution. Provided, further that no gasoline or distillate shall be included in the measure of any dealer's tax liability when such gasoline or distillate was delivered within another state into the tank of the motor vehicle using it. (1923, ch. 58, sec. 3; 1925, ch. 467, sec. 2; 1929, ch. 27; 1931, ch. 40, sec. 1; 1933, ch. 130, sec. 3; 1937, ch. 202, sec. 2.)

1128.1. *Refund when gasoline used for industrial purposes.*—The tax on all gasoline, other than on gasoline as defined in section 1126, subsection (a) of the fifth paragraph, shall be refunded when used for industrial purposes and not used in internal combustion engines, subject to such general limitations and regulations as the commissioner may prescribe. The users of gasoline claiming the benefit of this section must obtain annually from the department of finance and taxation an "industrial user's permit" and the commissioner of finance and taxation is empowered to prescribe rules and regulations covering refunds; but a refund shall not be allowed until such rules and regulations are fully complied with. (1937, ch. 288, sec. 1.)

1129. *Monthly payments.*—Such tax shall be paid in monthly installments. If the tax shall not be paid on or before the 20th day of said succeeding month, it shall become delinquent, and subject to a penalty of one per cent. per day for not exceeding ten days, and it shall be the duty of the

comptrolier to proceed to collect same, with the penalty and interest by a distress warrant against the delinquent and his surety, and/or suit. (129, ch. 124, sec. 2.)

1130. *Loss of gallonage, allowances for, reports, proof.*—Allowance under general rule, covering loss of gallonage resulting from evaporation, handling, and unloading, must be uniform for all distributors, and other persons, required to pay the tax. Such allowance shall be based on gallonage shipped from the refinery as shown by the refinery invoice; provided, however, that where the gallonage shipped as shown by the refinery invoice is less than the gallonage actually received by the distributor or other person required to pay the tax, the allowance shall be based on the gallonage actually received.

Allowance under special rule, covering loss of gallonage due to fire, flood, storm, theft or other causes over which distributor has no control (exclusive of loss resulting from causes listed under general rule) will be made provided that such loss is immediately reported to the commissioner of finance and taxation; and further provided that an affidavit is made before a notary public setting out a complete description of the loss sustained, together with the further facts as to the nature of the casualty and date and time it occurred; provided that such proof of loss shall be satisfactory to the commissioner. (1923, ch. 58, sec. 5; 1925, ch. 19, sec. 2; 1933, ch. 130, sec. 4; 1939, ch. 229, sec. 1.)

1131. *Records kept by dealers and distributors, invoices of carriers, penalty.*—Each person refining, storing, selling, distributing, or handling gasoline or distillate

in this state, shall keep a record showing from whom the same was received, the date of its receipt, and the number of gallons received, together with such other further and different information as the commissioner may require.

Persons transporting gasoline or distillate not previously identified as a measure of the tax liability of a registered distributor, shall have at all times with them subject to scrutiny of representatives of the department of finance and taxation and all peace officers a true record showing where and from whom the gasoline or distillate was received, day and time of receipt, number of gallons, destination, and such other, further, and different information as the commissioner may require.

Persons transporting gasoline and distillate previously identified as a measure of the tax liability of a registered distributor, shall, if the quantity transported exceeds forty gallons, be subject to the provision of the foregoing paragraph.

Violation of any of the provisions of this section is hereby declared to be a misdemeanor and shall be punishable by a fine of not less than twenty-five ($25.00) dollars nor more than fifty ($50.00) dollars for each offense. (1923, ch. 58, sec. 5; 1933, ch. 130, sec. 5.)

1132. *Monthly reports of distributors.*— Each distributor must, within twenty days after the end of each month, make out in duplicate, on forms prescribed by the commissioner of finance and taxation, and deliver to the said commissioner, a true statement showing the total number of gallons of gasoline or distillate compounded, refined, manufactured, or produced by him

in this state, and/or the number of gallons of gasoline or distillate transported, imported, or caused by him to be imported into this state; also a true statement showing the number of gallons stored, sold, or distributed by such distributor during the month, the total amount due the state as privilege taxes for such month, together with such other further and different information as the commissioner shall require. (1923, ch. 58, sec. 6; 1925, ch. 19, secs. 2, 3; 1933, ch. 130, sec. 6.)

1133. *Those not distributors, statement required.*—Each person other than a distributor who may be required under the foregoing sections to pay the privilege tax on gasoline or distillate, shall file a statement with the commissioner of finance and taxation as required by section 1132 and shall conform in all other respects to the provisions of said section. (1923, ch. 58, sec. 6; 1925, ch. 19, secs. 2–5; 1933, ch. 130, sec. 7.)

1134. *Commissioner's action on reports.*—The commissioner shall file one of such statements in his office and shall deliver the duplicate copy thereof to the comptroller. (1923, ch. 58, sec. 6; 1933, ch. 130, sec. 8.)

1135. *Distributors and dealers to pay when reports filed.*—Each distributor and each dealer must, within twenty days after the end of each such month, and at the same time the statement required by sections 1132–1134, is delivered to the commissioner of finance and taxation, pay the comptroller through commissioner of finance and taxation the amount of the privilege tax shown by such statement to be due for the month for which the statement is made and filed.

(1923, ch. 58, sec. 7; 1925, ch. 19, secs. 2, 3; 1933, ch. 130, sec. 9.)

1136. *Unlawful to fail to report or to make a false report, penalty.*—It shall be unlawful for any distributor or dealer to fail, neglect, or refuse to make and file any statement required by the provisions of said sections, in the manner, or within the time therein provided, or to make any such statement false in any particular.

Any person violating the provisions of this section shall be deemed guilty of a misdemeanor and shall be fined not less than twenty-five dollars nor more than fifty dollars for each offense. (1923, ch. 58, sec. 8; 1933, ch. 130, sec. 10.)

1137. *Delinquent taxes, enforcing payment, penalties.*—Upon the failure of any person engaged as distributor or dealer to make and deliver to the commissioner of finance and taxation the statement above provided for, or to pay the taxes due, it shall be the duty of the commissioner to revoke his permit, and immediately to proceed to inform himself as best he may regarding the matters and things to be set forth in such statement, and, from such information as he may be able to obtain, to make a statement, showing such matters and things, and determine and fix the amount of the privilege tax due the state from such delinquent person, and proceed to collect said amount, including a penalty of one per cent. per day, for not exceeding ten days, and interest, by the issuance of a distress warrant against the delinquent and the surety on his bond, and, if necessary, by suit on the bond. Upon the request of the commissioner of finance, it shall be the duty of the attorney-general to institute

and prosecute to conclusion all proper and necessary suits for the collection of the taxes. (1929, ch. 124, sec. 3; 1933, ch. 130, sec. 11.)

1138. *Statement prepared by commissioner presumed correct.*—Said statement, as prepared by the commissioner, shall be deemed prima facie correct, and the burden of proof shall be upon the distributor or dealer to prove its incorrectness in any action growing out of matters and things contained therein. (1929, ch. 124, sec. 3; 1933, ch. 130, sec. 12.)

1139. *Distributor to make invoices to purchasers of original packages.*—Every distributor selling any gasoline or distillate in this state, in the original packages in which shipped, transported or imported into this state by such distributor, shall at the time of making such sale, make out and deliver to the purchaser thereof, an invoice, in which invoice shall be stated the number of gallons of gasoline or distillate covered by such invoice, and that the same has been sold in the original packages in which the same was shipped, transported or imported into this state. (1923, ch. 58, sec. 10.)

1140. *Storage for export out of state, exception from act, conditions.*—Gasoline or distillate not previously the subject of an original sale in this state, stored in this state for export to points outside the state, shall not be included in the measure of the tax liability of any distributor or dealer; provided that such gasoline or distillate is stored in a separate tank marked "export tank";

Provided that a bond is executed by the distributor or dealer that in the opinion of the commissioner of finance and taxa-

tion adequately protects the state against loss of tax in case said gasoline or distillate is not subsequently exported outside the state;

Provided that gasoline or distillate stored for export longer than a period of sixty days must be included in the measure of the tax liability of the distributor or dealer so storing such gasoline or distillate. (1923, ch. 58, sec. 11; 1933, ch. 130, sec. 13.)

1141. *Commissioner of finance and taxation to collect the taxes and pay to state treasurer; expenses limited.*—It shall be the duty of the commissioner of finance and taxation to collect all taxes accruing under this law, and to issue proper receipts therefor, and to pay over all taxes so collected to the state treasurer, who shall place them to the credit of a fund to be used solely in the construction and maintenance of the highway system of the state, and not exceeding two per centum (2%) of said fund shall be used for expenses of administration, provided, however, that as to the portion of said fund going to the counties, only one per centum (1%) shall be charged and deducted therefrom for the cost of collection and administration. (1923, ch. 58, sec. 12; 1925, ch. 19, sec. 1; 1933, ch. 130, sec. 14; 1939, ch. 207, sec 1.)

1141.1. *Sections 1126–1141 and other statutes not applicable to refineries.*—Neither the inspection, the fees nor the taxes to be made or paid upon petroleum and petroleum products, particularly the statutes and laws providing for the inspection and testing of illuminating oils and volatile substances and the fees provided therefor, as set out in chapter 42 of the 1932 Code of Tennessee, being sections 6809 to 6850

thereof, both inclusive, and the laws relating to privilege taxes for dealing in and storing such products, particularly as set out in chapter 58 of the Public Acts of 1923, being sections 1126 to 1141, both inclusive, of the 1932 Code of Tennessee, as amended by chapter 130 of the Public Acts of 1933, and as set out in chapter 11 of the Public Acts of 1931, Extraordinary Session [vol. 7, p. 557], and as set out in chapter 77 of the Public Acts of 1933 [§§ 1148.1–1148.3], and as set out in the General Revenue Bill, being chapter 108 of the public Acts of 1937 [§§ 1248.1 et seq.], and any amendments to any of said laws, shall be applicable or collectible in the following cases:

(1) Upon any of such products while being transported from within or without the State of Tennessee to a petroleum refinery within the State of Tennessee for the purpose of there being refined, further refined or processed.

(2) Upon any of such products while being refined, further refined, processed or stored at a petroleum refinery within the State of Tennessee.

(3) Upon any of such products while being transported from a refinery within the State of Tennessee to another petroleum refinery within the State of Tennessee.

(4) Upon any of such products while being transported from a petroleum refinery within the State of Tennessee to a pla e outside the State of Tennessee. (1941, ch. 133, sec. 1.)

1142. *Commissioner of finance and taxation may issue distress warrant for past-due taxes; penalty; fee.*—The commissioner of finance and taxation, in the name of the state, may issue a distress warrant for the collection of such tax when past-due, and

for the penalties and costs; and a penalty of one per centum per day is imposed for the failure to pay such tax, and a fee of two dollars for the issuance of a distress warrant, and the usual commissions allowed officers collecting money by virtue of an execution issuing from a court of record; provided, however, when the penalty reaches ten per cent. no further penalty shall be collected. (1925, ch. 19, sec. 6; 1933, ch. 130, sec. 15.)

1143. *Dealers required to obtain permit.*—It shall be unlawful for any distributor or other person to engage in the business of selling, storing or distributing, in intrastate commerce, gasoline or distillate without first having obtained a permit to carry on such business from the commissioner of finance and taxation. (1929, ch. 124; 1929, ex. ses., ch. 28; 1933, ch. 130, sec. 16; 1937, ch. 202, sec. 3.)

1144. *Application.*—Every person desiring a permit to engage in said business of distributor, dealer, or distributing and storing gasoline, shall make application in writing therefor to the commissioner, on forms to be by him provided, which application shall show:

(a) The name and address of applicant;

(b) Whether individual, partnership, association or corporation, and, if partnership or association, the names and addresses of each member;

(c) Whether it is the purpose of applicant to engage as distributor, dealer, or storer, and

(d) Whether wholesale, retail, or both. (1929, ch. 124.)

1145. *Bond required.*—* * *

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1145.1. *Deposit of collateral in lieu of bond; bond; registration.*—* * *

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1146. *Revocation of permit, grounds, abatement of violation of act as nuisance.*—The permit of every distributor, dealer or storer who fails to keep the records, or fails to make and deliver the statements and reports required, or who fails to pay the taxes accrued before they become delinquent, or fails to make and maintain bond as required by law, shall be revoked, and the carrying on of such business thereafter shall be unlawful.

If any distributor or other person operates without a permit a business for which a permit is required under the provisions of the preceding sections he shall be guilty of a misdemeanor and shall be fined for each separate exercise of the functions of such business the sum of twenty-five to fifty dollars.

Provided, further, that the commissioner may in his discretion and in the alternative, proceed under the provisions of sections 9316 and 9317 of the Code of Tennessee, 1932, to abate and enjoin the further carrying on of said business as a public nuisance. (1929, ch. 124; 1933, ch. 130, sec. 17.)

1147. *Forms, cancelation of permits, report.*—It shall be the duty of the commissioner of finance and taxation to provide all necessary and appropriate blank forms and stationery for carrying the provisions of this law into effect, the same to be provided and paid for as other supplies for his department are provided; to cancel permits of delinquents and promptly report them to the comptroller for such pro-

ceedings as by law and this statute authorized. (Ib.; 1929, ex, ses., ch. 28; 1933, ch. 130, sec. 18.)

Public Acts of Tennessee, 1943:

CHAPTER NO. 50

Senate Bill No. 315

(By Ballew.)

AN ACT To regulate the storage and inspection of gasoline and other volatile substances where the same is manufactured in Tennessee or has come to rest in Tennessee after shipment in interstate commerce and stored in this State pending the export of such gasoline or other volatile substances to points outside the State; to fix inspection fees and provide penalties for violation of the Act.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee,* That whenever any gasoline, benzol, burning oil, distillate, fuel oil, gas oil, kerosene, naphtha, or other volatile substances reflecting a gravity of 16 degrees or above on the Baume scale, produced from petroleum, natural gas or coal, by whatever the name known, and the substitutes therefor, are stored in this State, or whenever such products have come to rest after shipment in interstate commerce and are stored in this State, except when stored at or shipped to or from a petroleum refinery located in this State, and such products are subsequently exported to points outside the State, and same shall be inspected under the provisions of the Code of Tennessee, Sections 6809–6850.6 inclusive, and an inspection fee of one-twentieth of one cent per gallon is hereby levied upon such petroleum products temporarily stored in Tennessee and subsequently exported to points outside the State. Distributors or dealers of said exported petroleum products as enumerated in this Act shall make

reports to the Commissioner of Finance and Taxation and pay all inspection fees herein levied in like manner as other oil inspection fees levied by the Code of Tennessee, Sections 6809–6850.6 inclusive.

SEC. 2. *Be it further enacted,* That any distributor, dealer or other person storing gasoline or other volatile substances enumerated in this Act for export, shall execute a bond which in the opinion of the Commissioner of Finance and Taxation adequately protects the State against loss of tax in case such gasoline or other volatile substance is not actually exported outside the State.

SEC. 3. *Be it further enacted,* That it shall no longer be necessary for distributors or dealers to maintain separate export tanks and to export gasoline or other volatile substances within sixty days as is provided by the Code of Tennessee, Section 1140.

SEC. 4. *Be it further enacted,* That all gasoline or other volatile substances as described in this Act which are exported to points outside the State, shall only be liable for the inspection fee of one-twentieth of one cent per gallon as levied in Section 1 of this Act, and there shall be no liability for gasoline taxes levied under the Code of Tennessee, Sections 1126–1148.3 inclusive, nor shall there be any liability for the inspection fees levied under the Code of Tennessee, Sections 6809–6850.6 inclusive—it being the legislative intent to make a separate classification for the gasoline and other volatile substances described herein which are exported to points outside the State.

SEC. 5. *Be it further enacted,* That the provisions of this Act shall not apply in

any case except where such gasoline or other volatile substance is exported from the State of Tennessee by common carrier or contract carrier who are duly licensed and hold certificates from either the Interstate Commerce Commission or the Railroad and Public Utilities Commission of Tennessee, or both. Provided, however, that the Commissioner of Finance and Taxation is authorized to promulgate rules and regulations permitting the export or movement to other states of the products enumerated in this Act by other modes of transportation, and the provisions of this Act shall apply where the export or movement beyond the State is made in compliance with such rules and regulations.

SEC. 6. *Be it further enacted,* That the provisions of this Act are hereby declared to be severable. If any of its sections, provisions, exceptions, sentences, clauses, phrases or parts be held unconstitutional or void, the remainder of this Act shall continue in full force and effect, it being the legislative intent now hereby declared that this Act would have been adopted even if such unconstitutional or void matter had not been included therein; that this Act take effect from and after its passage, the public welfare requiring it.

Passed: February 4, 1943

BLAN R. MAXWELL,
Speaker of the Senate.
JAS. J. BROOME,
Speaker of the House of Representatives.

Approved: February 9, 1943.

PRENTICE COOPER,
Governor.

U. S. GOVERNMENT PRINTING OFFICE 1943